APPEAL NO. 93420

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On April 12, 1993, a contested case hearing was held in city, Texas, with hearing officer presiding. The hearing was continued to April 21, 1993 at which time it was concluded. The issues agreed upon at the hearing were: 1) Did Claimant sustain an injury to her feet in the course and scope of her employment on or about Date of injury; 2) Did Claimant timely notify the Employer of a work-related injury; 3) Did Claimant file a claim for compensation with the commission in a timely manner; and, 4) What is the period of Claimant's disability? The hearing officer determined that claimant sustained a repetitive trauma injury to her feet, that claimant gave timely notice of her injury to the employer, that because the employer failed to file a written report of injury, the one year limitation for filing a claim did not begin to run until employer filed the report of injury and that claimant had disability.

Appellant, carrier herein, contends that the hearing officer erred, that claimant has failed to meet her burden of proof and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, responds that the decision is supported by the evidence and requests we affirm the decision.

DECISION

Finding that the decision of the hearing officer is erroneous as a matter of law, we reverse and render a new decision that claimant's condition does not constitute a compensable injury.

It is undisputed that claimant was employed as a flight attendant by American Airlines, employer herein, since 1988. Claimant testified her hours varied but that sometimes she worked 12 to 14 hours at a stretch and that she was on her feet 80% to 90% of the time. Claimant testified that she began having problems with her feet after she had worked several years for the employer and that she consulted (Dr. G), an orthopedic surgeon who specialized in foot problems. Dr. G first saw claimant on Date of injury, and diagnosed claimant as having "hallux valgus metatarsus varus bilaterally." Claimant testified surgery was discussed but that she elected to attempt to treat her foot problem herself. Claimant testified she called her supervisor, Harold Hamilton (HH) the same day she saw Dr. G (Date of injury). Claimant states she sought information about filing a workers' compensation claim but HH advised her not to do so because he thought her claim would be "challenged." Claimant's foot problems did not improve and in October of 1992 claimant returned to Dr. G for evaluation. Surgery was still recommended. Claimant filed a written report with her supervisor and advised that she would have surgery on November 2, 1992. After the surgery, claimant remained off work until February 4, 1993, when she was cleared to returned to work.

Claimant contends her work activities caused, or at least aggravated, her foot condition by causing her to wear a "required" shoe. Claimant stated she did not have foot

problems prior to her employment with this employer and that the long hours and "required" shoes placed extra stress on her feet which contributed to her condition and eventual need for surgery. Both claimant's testimony on cross-examination, and claimant's supervisor, as well as the dress code regulation placed into evidence, stated that the uniform shoe could be any style provided the shoe is "a solid dark navy leather that matches the uniform navy . . . the heel . . . (measured from inside of the shoe heed) may vary 1/2" to 2-1/2" in height . . . have a closed heel and toe with no cutouts." Cowboy boots, athletic shoes, "negative heels," or moccasins were not approved. In flight alternate shoe heels could "vary from flat to 1" . . . excluding moccasins or ballerina styles." Dr. G's initial impression on Date of injury was ". . . I think (claimant) is wearing shoes that are too short and would recommend that she check her shoe length before anything is done surgically to those things . . . . She is to try longer shoes . . . . She indicated that this was workers comp. related because of the shoes that she is supposed to wear." The evidence is unclear, and claimant is vague, as to what steps she took to obtain longer, better fitting shoes. The shoe regulation and the testimony clearly indicate that claimant had a choice of footwear, as long as it met the color, heel height, closed heel and toe requirements and were not cowboy boots, moccasins or athletic shoes (which seemed to be what claimant preferred).

Dr. G is the treating and only doctor involved in this case. His initial report of Date of injury, as noted above, indicates that he initially thought claimant's "shoes . . . are too short." In a November 25, 1992, report "To Whom It May Concern" Dr. G recounts the history given him by the claimant and notes "My advice to this patient has been a change in footwear, (to lower shoes with wider forefoot) which she indicated she had already done and it hadn't helped any." In a March 23, 1992 "To Whom It May Concern" Dr. G states claimant ". . . has to wear a particular type of shoe in her work. Due to the problem with her feet, I have suggested that she get a pedicure once a month to help in the relief of her foot pain due to shoe wear." This report was written at claimant's request so that she could list the monthly pedicure as a medical expense on her federal income tax return.

Dr. G's medical records also contain unsigned and undated notations, apparently, according to claimant's testimony, made by Dr. G's insurance clerk, stating "[claimant] wants you to write a letter to her employer stating it was her job that caused her foot problem" and "[claimant] . . . needs you to validate that this accumulative trauma caused by wearing this type shoe for extended hours and that you feel injury is work related." Someone, apparently Dr. G, struck through the word "related" and wrote "aggravated." The last memo also had a notation, again apparently made by the insurance clerk, "[claimant] doesn't want you to mention she could change to other shoe wear. State that patient says she wears required shoes all the time." This is exactly what Dr. G did in a memo dated October 20, 1992. A draft of the October 20, 1992 memo in Dr. G's files contains hand written notations, again apparently by the insurance clerk, "add: Patient states that this condition was caused by the shoes she was required to wear at work. Wants letter stating how she got this condition (work shoes). She needs before March 1 for WC." Claimant in a letter dated

March 1, 1993, to Dr. G again asks for Dr. G's assistance in helping her ". . . establish my claim that my occupation as a flight attendant prompted my condition, as compared to a 'normal' occupation - somebody in an office environment who is able to get off their feet periodically and walk on softer surfaces." Claimant then details what walking and standing she does as a flight attendant. Carrier propounded seven questions to Dr. G by letter dated April 8, 1993. In the response Dr. G indicated that he had not inspected the shoes claimant wore on duty because she wore athletic shoes to doctor appointments, that he had not reviewed the employer's uniform shoe regulations, that he was "aware of the types of shoes" employer's flight attendants wear because he had observed them "around airports and airlines," that he became aware that claimant's condition was work related "when she told me." Dr. G states claimant's condition "is hereditary in most cases, but is aggravated by ill fitting and ill advised shoes." Dr. G also states "[b]unions are usually hereditary and are aggravated by improper footwear . . . . When employees are allowed to select their own footwear, they generally don't have problems with the bunions unless they are extremely vain and wear ill fitting shoes . . . ."

The hearing officer, in pertinent part, found:

FINDINGS OF FACT

5.Employer prescribed a uniform shoe for all female flight attendants. The main uniform shoe was required to have a closed heel and toe with a heel of 1/2" to 2 1/2" in height. An in-flight alternate shoe for wear during in-flight food and beverage service has the same specification except the heel may vary from flat to 1" in height.

7.Claimant's foot problems developed gradually and on Date of injury, Claimant sought medical treatment from [Dr. G], an orthopedic surgeon.

8.[Dr. G] diagnosed Claimant as having Hallux Valgus, bilaterally and recommended surgery.

9.Claimant notified [HH], her supervisor, of [Dr. G's] recommendation on Date of injury, and advised him that she considered her foot problem to be work related.

10.In November of 1991 Claimant elected not to pursue the surgery and continued to perform her regular duties.

11.Claimant's foot pain gradually worsened and she returned to [Dr. G] for treatment on October 8, 1992.

17.Claimant's abnormal growths (bunions) on her feet were not caused by her working conditions.

18.Claimant suffered a repetitive trauma injury because her work activities as a flight attendant aggravated her foot condition.

CONCLUSIONS OF LAW

2.Claimant suffered a repetitive trauma injury in the course and scope of her employment.

3.Claimant knew or should have known that her repetitive trauma injury was work related on Date of injury.

9.Claimant did sustain a compensable injury.

Although we have not previously considered a flight attendant claim for repetitive foot trauma, we have on occasion considered similar claims involving different occupations. Texas Workers' Compensation Commission Appeal No. 92220, decided July 13, 1992, was a case, cited by the ombudsman in closing argument, with similar facts (janitor at an airport walked six to nine miles daily on a concrete floor during an eight hour shift). The doctor in that case diagnosed "bilateral hallux valgus with prominent bunions." (This is the same diagnosis claimant had in the instant case). We held expert medical testimony was necessary to establish a "reasonable probability" that the condition is causally connected to the employment. In that case the employee's doctor noted that the employee's problem was progressive in nature and longstanding. We noted in that case, "[a]ppellant's (claimant) testimony to the effect that her (claimant's) symptoms occurred during a period in which she was employed did not mandate the conclusion that her employment was the cause of her foot problems." We affirmed the decision of the hearing officer that claimant failed to show that her bunions and corns arose out of her employment.

Texas Workers' Compensation Commission Appeal No. 93390, decided July 2, 1993 involved a hotel bellman whose feet became irritated with itching and swelling. The diagnosis was "plantar fascitis." In that case we cited Appeal No. 92220, *supra*, and pointed out that ". . . the 1989 Act defines 'injury' to include 'occupational diseases' which include 'repetitive trauma injuries' which are defined as 'damage or harm to the physical structure of the body occurring as a result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment'." We further observed that an occupational disease does not include an ordinary disease of life to which the general public is exposed outside of employment unless such disease is incident to a compensable injury or occupational disease. After noting that the claimant bears the burden to prove the injury was received in the course and scope of employment, we stated

that "[t]o recover for a repetitive trauma injury, one must not only prove that repetitious physical traumatic activities occurred on the job, but also prove that a causal link existed between the activities on the job and one's incapacity; that is, the disease must be inherent in that type of employment as compared with employment generally. (Citation omitted.)" In Appeal No. 93390, *supra*, as in Appeal No. 92220, *supra*, we found the foot condition not compensable because there was no causal link between the work related activities and the medical condition.

In Texas Workers' Compensation Commission Appeal No. 92713, decided February 8, 1993, a saleslady contended she suffered a repetitive trauma injury to her knee caused by "being on her feet and walking around her department" for eight hours a day. The employee in that case testified that she was not permitted to sit down or take breaks and that her department was busy all the time. In that case, we recited the definition of repetitive trauma injury and noted that while repetitive trauma is included under the definition of an occupational disease the term occupational disease does "not include an ordinary disease of life to which the general public is exposed outside of employment." We went on to state:

> Unquestionably, we believe, the general public is exposed to any "hazards" inherent in walking and standing, and that such activities are an attribute of employment generally (as well as of daily living). Although the claimant testified generally that she walked around her department and stood on her feet much of the day, there is nothing in the record indicating that such walking or standing, . . . amounted to a particular stress over and above that which would be encountered by the general public, or employment generally . . . .
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> Thus, assuming that a case could be made that a particular employment created a trauma as a result of standing or walking that was not inherent in daily life or employment generally, the hearing officer was correct in his determination that the evidence in this case fails to demonstrate that an injury was sustained in the course and scope of claimant's employment.

Carrier contends that claimant did not sustain an "on-the-job" injury to her feet but rather suffered from bunions, a congenital condition and/or disease. We note that whether claimant's condition is an "ordinary disease of life," as discussed in Appeal No. 93390, *supra*, is only casually mentioned by the ombudsman in the closing statement where she states "[s]hould bunions be considered as a normal disease of life trivializes the fact that the required shoes aggravated the condition." Dr. G on several occasions (reports of March 8, 1993; April 19, 1992) states that bunions and claimant's condition of bilateral hallux valgus is a hereditary condition which is aggravated by "ill fitting and ill advised shoes." We noted that initially Dr. G, in his report of Date of injury, states he believes claimant "is wearing

shoes that are too short and . . . (claimant should) check her shoe length . . . ." Claimant then attempts to say that the employer required her to wear that particular shoe or type of shoe. Actually the testimony and uniform shoe regulation make clear that flight attendants can wear their choice of style, size or type of shoe provided it is dark blue leather, with a closed heel and toe and have heels between 1/2" and 2-1/2" with in-flight alternate shoes having a flat heel to 1" heel. The only excluded types and styles are cowboy boots, athletic shoes, moccasins, and ballerina styles. Dr. G, despite claimant's apparent prompting, refused to say claimant's shoes caused claimant's condition but only said long hours wearing ill fitting," improper footwear" can aggravate claimant's hereditary condition. Dr. G also referred to claimant saying that she attributed her condition to the shoes she was "required to wear" at work. Claimant attempts to create an inference she was required to wear a certain style or type shoe. Dr. G clearly believes athletic shoes like those worn by Southwest Airlines (Reports of March 8, 1993, and April 19, 1993) are preferable shoe wear for flight attendants, however, it would appear other types and styles of shoes, properly fitted, meeting the employer's requirements, could be acceptable. Claimant also requested that Dr. G not mention that she could change to other, presumably better fitting, shoe wear.

Claimant, in her response, continued to refer to "required regulation footwear" as if there was a specific shoe that flight attendant's are required to wear. In our opinion, the evidence does not support this assertion. It is clear any size, type or style shoe can be worn provided it meets minimal requirements of color and heel size. Only three or four styles (i.e. boots, moccasins, ballerina styles) are excluded. No particular type or style of footwear "was imposed" on claimant as she contends, such that it could be said that flight attendants for employer were exposed to a hazard because of their employment to which the general population was not also exposed.

The hearing officer in Finding of Fact 5 recites the employer's requirements in footwear. Any inference that those parameters constituted a "required" shoe is against the great weight and preponderance of the evidence which would indicate that claimant could change footwear and had a choice within the broad parameters of employer's regulation. As such claimant was not exposed to a greater hazard in her employment than that of the general shoe wearing public.

In Employers' Casualty Company v. Bratcher, 823 S.W.2d 719 (Tex. App. - El Paso, 1992, n.w.h.) the court referred to the positional risk or "but for" test which focuses on whether the injury would have occurred if the conditions and obligations of employment had not placed claimant in harm's way. That case involved an aneurysm bursting while the employee was in the bathroom and the court said the risk was one the employee "would have confronted irrespective of any type of employment." As applied to the instant case, given the specific facts of this case, which were that claimant had a condition that was largely hereditary, that contrary to claimant's assertion she had a choice in footwear provided it met certain broad parameters, and that her job required her to be on her feet long hours, did not

place her at greater risk than the general public. We cannot say "but for" her employment claimant would not have suffered this condition. Claimant, in any position, would have probably been required to wear shoes. The restrictions placed on claimant's choice of shoe was not so narrow or stringent to require a shoe which necessarily aggravated claimant's hereditary condition. Therefore, under the facts in this case, as recited in this opinion, we find, as a matter of law, that claimant's injury is not compensable.

Parenthetically we note that the hearing officer in one finding of fact found, correctly we think, that claimant's bunions "on her feet were not caused by her working conditions." However, in the following finding the hearing officer finds that another foot problem is compensable. There appears to us to be some degree of inconsistency in these two findings, particularly where both conditions are described as hereditary and both can be aggravated by ill fitting or ill advised shoes.

Carrier also appeals the hearing officer's determination on notice, claimant's failure to file her claim within one year of the date she knew or should have known her injury was work related and determination of disability. We have reviewed the record and conclude that the hearing officer's determinations regarding notice and filing of claimant's claim were correct and supported by sufficient evidence. The issue of disability, of course, revolves around whether the injury was compensable. Had the injury been compensable claimant would have had disability, as defined by the 1989 Act, for the time claimant was unable to walk sufficiently to obtain or retain employment,

Accordingly we reverse the decision of the hearing officer and render a new decision that claimant did not sustain an injury to her feet in the course and scope of her employment and is therefore not entitled to medical and income benefits.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Susan M. Kelley
Appeals Judge